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Supreme Court of the United States

October Term, 1979

No. 79-565

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,

Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

Statement of the Case

A. Introduction

This case involves an appeal from a judgment (J.S. App. 74a-75a)[1] of the Court of Appeals of the State of New York.

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[1] References to J.S. App. ..... are to pages in Appellant's Appendix to Jurisdictional Statement.

The court upheld an order of Appellee Public Service Commission of the State of New York (Commission) banning promotional advertising by New York State electric utilities subject to the Commission's jurisdiction.

The Commission's order accompanied its Statement of Policy on Advertising and Promotional Practices of Public Utilities dated February 25, 1977 (J.S. App. 32a-55a). It continued a prohibition on promotional advertising imposed in the wake of the 1973 Arab oil embargo where the Commission had ordered (J.S. App. 31a): "[a]ll electric corporations are hereby prohibited from promoting the use of electricity through the use of advertising, subsidy payments not committed prior to the date of this order, or employee incentives."

Central Hudson Gas & Electric Corporation (Central Hudson), while not challenging the provisions on subsidy payments or employee incentives, did seek to reverse the promotional advertising restriction in a proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules. The Commission's directive was affirmed by the New York Supreme Court (J.S. App. 22a-24a), the Appellate Division of State Supreme Court, Third Department (J.S. App. 15a-21a), and finally, the New York Court of Appeals (J.S. App. 25a-31a).[2]

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[2] A parallel proceeding challenging the Commission's order was brought by Long Island Lighting Company in the United States District Court for the Eastern District of New York. Judge Pratt granted Long Island Lighting Company judgment declaring that the Commission's advertising policy statement and subsequent implementing orders: "... to the extent that they prohibit plaintiff LONG ISLAND LIGHTING COMPANY (LILCO) from truthful promotional advertising of electric space heating, violates the First Amendment and are, therefore, unconstitutional..." He enjoined the Commission from enforcing its prohibition but stayed his order pending consideration of the case by the United States Court of Appeals for the

(Footnote continued on following page)

The *Central Hudson* case was determined in the State courts concurrently with another proceeding, *Consolidated Edison Company of New York, Inc. v. Public Service Commission of the State of New York*. That case involved a challenge to another portion of the Commission's Advertising Policy Statement—a prohibition on the use of bill inserts by utilities to espouse the position of utility management on controversial matters of public policy. The Court has noted probable jurisdiction (No. 79-134, October 1, 1979) of Consolidated Edison's appeal. This Court subsequently noted probable jurisdiction in the present case on November 26, 1979.[3]

B. The Decisions Below

The Commission's February 25, 1977 policy statement was issued at the culmination of its investigation into advertising practices by New York State utilities. During the investigation, the Commission considered, *inter alia*, whether it should alter its 1973 ban on promotional advertising by electric utilities (J.S. App. 25a-31a). No party advocated per-

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(Footnote continued from preceding page)

Second Circuit. Portions of Judge Pratt's opinion dealing with promotional advertising are included at J.S. App. 88a-97a. No decision has as yet been reached by the Second Circuit. Petitions for certiorari to consolidate the Long Island Lighting Company case with the instant case, and *Consolidated Edison Company of New York, Inc. v. Public Service Commission of the State of New York* (79-134), by Long Island Lighting Company (79-629) and Scientists' Institute for Public Information, *et al.* (79-595) have been denied .....U.S..... (January 14, 1980).

[3] In addition to Central Hudson's brief, we are also in receipt of briefs from several *amici* urging that this Court reverse the determination of the New York Court of Appeals. We have carefully examined the briefs of the *amici* and believe that we have dealt with the points made in those briefs in the context of our response to Central Hudson's submission. Several references will be made specifically to the brief of Long Island Lighting Company (LILCO) because of its detailed comments on various aspects of this case.

mitting general promotion of electricity and the Commission did not find persuasive the contention that its ban should be relaxed to allow promotional advertisement to encourage increasing off-peak loads (including electric space heating). The Commission stated (J.S. App. 36a-37a):

> We recognize now, as the Commission did in 1972, that development of off-peak loads may be beneficial in numerous ways. Increased off-peak generation, however, while conferring some beneficial side effects, also consumes valuable energy resources and, if it is the result of increased sales, necessarily creates incremental air pollution and thermal discharges to waterways. More important, any increase in off-peak generation from most of the major companies producing electricity in this State would not, at this time, be produced from coal or nuclear resources, but would require the use of oil-fired generating facilities. The increased requirement for fuel oil to serve the incremental off-peak load created by promotional advertising would aggravate the nation's already unacceptably high level of dependence on foreign sources of supply and would, in addition, frustrate rather than encourage conservation efforts. We realize, too, that a continued ban on promotion of off-peak electric usage may aptly be described as piecemeal conservationism since promotion of oil for use in heating or internal combustion applications is not similarly proscribed. Nevertheless, conservation of energy resources remains our highest priority. We do not consider it inconsistent with that principle to implement programs that admittedly will be less than optimally effective, in a national context. It is reasonable to believe that a continued proscription of promotion of electric sales will re-

> sult in some dampening of unnecessary growth so that society's total energy requirements will be somewhat lower than they would have been had electric utilities been allowed to promote sales.

The Commission did state that it would allow advertising if the "preponderant" purpose was to shift load from peak to off-peak (J.S. App. 37a). In addition, the Commission stated that it would be prepared to reconsider its ban from time to time if conditions change sufficiently to warrant it (J.S. App. 38a).

Several parties petitioned for reconsideration of the Commission's order. When denying the petitions, the Commission specifically considered the free speech First Amendment consequences of its order in response to a contention by Central Hudson that its right of free speech was abridged (J.S. App. 57a-58a):

> Central Hudson excepts to our decision to continue the existing prohibition of promotional advertising by both electric and gas companies. The utility contends that under *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), commercial speech is protected by the guarantees of the Bill of Rights and, therefore, our restriction on promotional advertising is void.
>
> * * *
>
> In *Virginia State Board of Pharmacy*, the Court could find no legitimate State interest in restricting the dissemination of pricing information to the public. A much different situation exists here. The rates of electric utilities in this State continue to rise. The need for such increases derives in substantial part from pressures for increasing plant capacity to meeting growing demand. While some progress is being made to price electricity to

meet its marginal cost, it is clear that the rates charged today do not cover the marginal costs of new capacity. In these circumstances, promotion of electric usage by electric utilities will simply exacerbate the pressure for spiraling prices. Moreover, when national policy requires energy conservation, the promotion of electricity by regulated public utilities provides totally misleading signals that conservation is unnecessary. This is especially true since the utilities in this State are expected to promote conservation by their customers.

While promotion of off-peak usage, particularly electric space heating, is touted by some as desirable because it might increase off-peak usage and thereby improve a summer-peaking company's load factor, we are convinced that off-peak promotion, especially in the context of imperfectly structured electric rates, is inconsistent with the public interest,[1] even if it could be divorced in the public mind from promoting electric usage generally. As we pointed out in our Policy Statement, increases in generation, even off-peak generation, at this time, requires the burning of scarce oil resources.[2] This increased requirement for fuel oil aggravates the nation's already high level of dependence on foreign sources of supply.

An additional area of legitimate State interest was pointed out by Chairman Kahn in his separate statement. The uncontrolled promotion of electric heating most likely means the installation of heat pumps, since they are the most promising mechanism for offsetting the

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[1] Advertisements encouraging installation of heating equipment will frequently occur during the summer periods when air-conditioning usage is at its peak and when requests for conservation are being made.

[2] We distinguish here between promotional advertising designed to shift existing consumption from peak to off-peak hours and advertising designed to promote additional consumption during off-peak hours. It is the latter that we proscribe here.

> relative inefficiency of converting fossil fuels into electricity; but installation of a heat pump means also installation of central air-conditioning. To this extent, promotion of off-peak electric space heating involves promotion of on-peak summer air-conditioning as well as on-peak usage of electricity for water heating. And the price of electricity to most consumers in the State does not now fully reflect the much higher marginal costs of on-peak consumption in summer peaking markets. In these circumstances, there would be a subsidization of consumption on-peak, and consequently, higher rates for all consumers. The promotion of electric consumption at rates that do not reflect the costs of it to society is not the kind of commercial speech contemplated by Virginia Board of Pharmacy.

Finally, the Commission concluded (J.S. App. 59a):

> It is clear, therefore, that there are ample grounds here for regulation of commercial speech. Manufacturers and dealers, whom we do not regulate, remain free to promote the use of electric equipment and appliances. Such advertising will not provide the same misleading signals to the public and at the same time will provide a means for the public to be advised of the available alternatives.

Central Hudson's attack on the Commission's ban has been rejected three times by New York State courts (J.S. App. 22a-24a, 15a-21a, 25a-31a). The New York Court of Appeals, affirming the decisions below, rejected Central Hudson's contention that the Commission lacks statutory authority to impose its ban and that the ban violates Central Hudson's constitutional right to freedom of speech and equal protection. The Court found clear authority for the Commission's order under the New York State Public Service Law Sections 4, 5, 65 and 66. It noted the imperative need for a utility subject to the Commission's jurisdiction to act in a reasonable manner that

will conserve resources of the state and nation (J.S. App. 4a-5a). The Court further found that the ban did not abridge Central Hudson's constitutional rights, citing the lower level of protection for commercial speech enunciated by this Court in *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978) (J.S. App. 10a). It found that utilities supply energy in a monopoly context making information customers might receive from promotional advertising by utilities of little value since service standards and rates are set by the Commission (J.S. App. 12a-13a). The Court concluded (J.S. App. 13a-14a):

> Indeed, promotional advertising is not at all concerned with furnishing information as to the "availability, nature, and price" of electrical service. It seeks, instead, to encourage the increased consumption of electricity, whether during peak hours or off-peak hours. Thus, not only does such communication lack any beneficial and informative content, but may be affirmatively detrimental to the society. It would not strain the bounds of judicial notice for us to take cognizance of the present energy crisis. Conserving diminishing resources is a matter of state concern and increased use of electricity is inimicable to our interests. Promotional advertising, if permitted, would only serve to exacerbate the crisis. In short, this constitutes a compelling justification for the ban.

Central Hudson thereupon brought this appeal (J.S. App. 76a-77a).

Summary of Argument

The New York Court of Appeals properly concluded that the Commission's restriction on promotional advertising by electric utilities was not prohibited by the First Amendment. The Court found that the Commission's prohibition was a reasonable restriction on electric utilities' commercial speech supported by paramount state interests.

In recent decisions, this Court when extending a measure of protection to commercial speech has been careful to note that there are "commonsense differences" between commercial speech occurring in an area traditionally subject to government regulation and other varieties. In this case, the would-be speaker is a regulated utility whose rates and service are completely controlled and subject to the regulation of the Commission. The Commission found that the monopoly supplier of electric service would not be acting in the public interest if it were to *promote* electric usage. Primarily, the Commission determined that promotion of electric usage is contrary to the express national and state policy of energy conservation (including lessened dependence upon foreign sources of oil supply) and attempts to achieve rate stability.

In addition, the Commission's promotional advertising ban and the Public Service Law are neither vague, lacking in standards nor overbroad. The Commission's directive, adopted pursuant to express authority conveyed in the Public Service Law, places electric utilities on notice as to what is prohibited, *i.e.*, promotional advertising, and extends no further than the promotion of electricity which the Commission has sought to ban. It does not bar furnishing of truthful and non-misleading information through utility advertisements that do not promote electric usage.

Finally, the Commission's order does not deprive electric utilities of equal protection in relation to oil heat dealers who are unaffected by the restriction. The Commission's ban is designed to advance specific governmental interests, many of no relevance to the fuel oil industry. The State is not required to regulate all promoters of energy at once, but may move gradually toward this goal.

ARGUMENT

I. The Commission's prohibition of promotional advertising is consistent with First Amendment requirements as delineated by this Court.

Despite Central Hudson's glowing generalities concerning the sanctity of free speech (Br. pp. 14-22), this case must be viewed on its own facts. The company is simply attempting to have this Court extend its prior decisions providing a measure of protection for commercial speech to the case where a regulated utility desires to promote the use of electric energy in the face of a finding by the Commission that promotion is detrimental to the public interest. Since this case involves commercial speech (Central Hudson desires to advertise to sell more electricity), the Commission's ban must be seen in light of the applicable constitutional standard enunciated by the Court when it recently extended First Amendment protection to commercial speech.

Commercial speech is the subject of a number of cases, including *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (pharmacists); *Bigelow v. Virginia*, 421 U.S. 806 (1975) (abortion services); *Linmark Associates, Inc. v. Town of Willingboro*, 431 U.S. 85 (1977) (residential real estate transactions); *Carey v.*

Population Services International, 321 U.S. 678 (1977) (contraceptives); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (legal services); *Friedman v. Rogers*, 440 U.S. 1 (1979) (use of trade names) and *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978) (solicitation of legal services). In addition, the Court has also considered First Amendment rights of corporations in the political arena in *First National Bank of Boston v. Bellotti*, 435 U.S. 763 (1978).[4] In the cases, where it has struck down prohibitions on advertising, and in *Bellotti*, the determination has been accompanied with a finding that the bans were not warranted by the state interests purported to be achieved. This Court has been careful, however, when extending First Amendment protection to commercial free speech to recognize that where important governmental interests are served by advertising bans that the prohibitions would be permitted. The Court has carefully noted that the interests purported to be served when free speech rights are abridged in the commercial context must be weighed against the rights of the speaker and the public to give and receive information. This Court has never found that a commercial advertising ban accomplished an important state objective and then found the ban to be invalid.

From *Virginia State Board of Pharmacy* to *Bates* to *Ohralik*, the Court has noted differences between commercial speech and other kinds. Its most complete enunciation of the special nature of commercial speech came in *Ohralik* (436 U.S. at 455-456 (1978)):

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[4] This Court has never considered commercial speech in the context of a monopoly supplier of services such as Central Hudson that may offer no service or charge no rate that is not subject to regulatory approval. The distinction is of particular importance because it relates directly to the state interests sought to be achieved by the Commission's advertising ban. (See Point II below.)

> Expression concerning purely commercial transactions has come within the ambit of the Amendment's protection only recently.[12] In rejecting the notion that such speech "is wholly outside the protection of the First Amendment," *Virginia Pharmacy, supra,* at 761, we were careful not to hold "that it is wholly undifferentiable from other forms" of speech. 425 U.S., at 771 n. 24. We have not discarded the "commonsense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. *Ibid.* To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.

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[12] See *Valentine v. Chrestensen,* 316 U.S. 52 (1942); *Pittsburgh Press Co. v. Human Relations Comm'n,* 413 U.S. 376 (1973); *Bigelow v. Virginia,* 421 U.S. 809 (1975); *Virginia Pharmacy Board v. Virginia Consumer Council,* 425 U.S. 748 (1976).

The Court further explained the relationship between the First Amendment and government regulation[3] (436 U.S. at 456):

> Moreover, "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part in-

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[3] The Court in *Ohralik,* thus reaffirmed the "two tier" theory of speech first formulated in *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942).

itiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). Numerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (CA2 1968), cert. denied, 394 U.S. 976 (1969), corporate proxy statements, *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), the exchange of price and production information among competitors, *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921), and employers' threats of retaliation for the labor activities of employees, *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61-62 (1973). Each of these examples illustrates that the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity. Neither *Virginia Pharmacy* nor *Bates* purported to cast doubt on the permissibility of these kinds of commercial regulation.

In order to relate better the Commission's order to cases previously decided by this Court, it must be remembered that the ban applies to only *promotional* advertising and not other types of advertising. Electric utilities may disseminate information about electricity and its uses so long as they do not promote its use.[6] This case is therefore much more like *Ohralik* than *Bates*. Ohralik's purported advertising was basically an attempt to have a client use his service whereas in *Bates* the advertisement under consideration simply provided price information so a potential client could judge whether to avail himself of Bates' service. This case unlike *Bates* does not present the question of whether the state can stifle all advertising concerning electricity.

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[6] To our knowledge no utility has attempted an informational advertising campaign although it would not be prohibited by the Commission's order.

The New York Court of Appeals was fully justified in following this Court's decisions when it upheld the Commission's ban on promotional advertising by electric utilities. The ban is an important tool for carrying out a valid state regulatory scheme that assures conservation of foreign fuel oil, the lowest possible rates to electric utility customers and general conservation of electric usage.

Central Hudson argues (Br. pp. 14-20) that promotion of electricity is of value both to the utility and to its customers and therefore deserving of a high degree of constitutional protection.[7] The utility's analysis, however, amounts to nothing more than an attempt to debate the findings of the Commission and the New York State courts as to the desirability of promotion.

While it apparently agrees (Br. p. 17) that promotion generally is not warranted and would exercise voluntary self-restraint, Central Hudson particularly seeks to promote through advertising some devices, including heat pumps, as energy conservation measures because it is in intense competition for space and water heating with gas and oil.

The problem with Central Hudson's argument is, as the Commission found (J.S. App. 57a), that any promotion of electricity runs directly counter to the utility's obligation to promote conservation and runs afoul of other state interests.

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[7] Central Hudson's assertion (Br. p. 14) that the Commission and the New York courts failed to consider the interests of the energy consuming public is totally without support. The Court of Appeals (J.S. App. 13a-14a) and the Commission (J.S. App. 37a, 57a-58a) both stressed the detrimental impact on the public if utilities engage in promotion. Central Hudson and the *amici*, including LILCO, also imply incorrectly that they are barred from informational advertising that advises the public that the utility is available to provide information on electric costs and equipment.

(*See* Point II below.) Obviously some advertisements may be less damaging to the public interest than others, but neither Central Hudson nor any other party made an attempt before the Commission to demonstrate or argue for a specific advertising strategy that would avoid the difficulties that the Commission found inherent in electric utility promotional advertising. The Commission, therefore, continued to enforce its ban on promotion which it had instituted in 1973.

Central Hudson's assertions that some promotion may be in the public interest are unsupported by the record. For example, Central Hudson's contention that heat pumps should be advertised was specifically rejected by the Commission (J.S. App. 58a) since the installation of heat pumps would lead also to the installation of central air-conditioning (a peak electric use). The company's rejoinder (Br. p. 18 n. 15) to this finding is the speculation, totally unsupported by the record, that "few would buy it who would not otherwise install a less efficient air-conditioner". If the company seriously believes this to be true, it might at least have brought the matter to the attention of the Commission as a reason for relaxing its ban.*

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* Central Hudson observes (Br. p. 18) that it may have to finance the installation of heat pumps pursuant to Article VII-A of the New York Public Service Law. The law, however, specifies that financing will have to be provided only if heat pumps are cost effective (will pay for themselves in seven years). Regulations implementing the heat pump provision of the law have not yet been promulgated.

Federal regulations implementing the National Energy Conservation Policy Act address the question of when utilities must provide audits to customers concerning the costs of various energy conservation devices. Those regulations, 10 C.F.R. Section 456.105(f) (3) (i), provide that heat pumps will only be audited to replace the same fuel type, *i.e.*, electricity. Further, the federal regulations (10 C.F.R. Section 456.102) provide that state measures implementing NECPA cannot include devices not included in the federal regulations unless it can be demonstrated to the Secretary of the Department of Energy that the device will use less oil than the heating source it replaces (10 CFR Section 456.319(b) (3) (i)). Since electricity in New York State is generated on the margin by oil, whether such a demonstration can be made remains to be seen.

Central Hudson also attacks (Br. p. 15) the finding of the Court of Appeals that since it operates in a non-competitive environment there will be little public good served by promoting a product (electricity) whose price and service is controlled by the Commission. The electric customer, of course, cannot be the recipient of a sale or a service extra because Central Hudson must charge nondiscriminatory rates and provide nondiscriminatory service (Public Service Law § 65). Therefore, unlike the potential customer of the pharmacist (*Virginia State Board of Pharmacy*), and subsequent cases decided by this Court in a competitive environment, the Court of Appeals found (J.S. App. 13a) that the consumer simply will not be able to find a better deal on electricity by shopping around.

Central Hudson's reply is that in one usage area, heating, it must compete with gas (which it also sells) and oil. The company, however, agrees (Br. p. 19) that heating systems are not changed every few years. For the bulk of Central Hudson's customers, the choice of heating fuel was made when their houses were built and advertising concerning new heating sources simply is of no more use to them then advertisements for snowmobiles would be to an audience of Florida consumers.

There may be some small body of consumers in Central Hudson's territory who are considering the installation of electric rather than oil heat. An aggressive promotional advertising campaign by Central Hudson *might* lead those customers to install electric space heating. In contrast to this small group, however, is the total body of Central Hudson's electric ratepayers who, the Commission found, will be adversely affected by promotional advertising. Unlike competitive economic entities, if Central Hudson's advertising

ultimately raises costs to all consumers (for the reasons discussed in Point II below), the Commission will have no alternative but to allow Central Hudson its reasonably incurred expenses and a reasonable rate of return on its investment (Public Service Law § 66). This case is therefore completely unlike the competitive situation existing in *Virginia State Board of Pharmacy* and subsequent cases considered by this Court where, if the advertiser was subsequently forced to raise its prices, the consumer could simply shift to another source of supply. The conscientious shopper could therefore take advantage of advertised products while later withdrawing patronage if another competitor offered more favorable terms. Here, Central Hudson's customers as a group will be forced to bear the ill effects of the utility's advertising since they have only one source of electric energy available.

Central Hudson also speculates (Br. pp. 18-19) on possible new products and uses of electricity it may desire to promote. If Central Hudson or any other utility has a specific proposal to advertise products that will be in accordance with the interests of utility ratepayers, the utilities may ask the Commission for exemptions from its advertising ban.[9] Any refusal to modify the ban would be readily reviewable in the state courts pursuant to Article 78 of the New York Civil Practice Law and Rules.

As a related matter, *amicus* LILCO adds the unsupported and misplaced contention (Br. pp. 11-20) that the Commission is somehow attempting to ban electric space heating

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[9] As an example of advertising that would be permissible, the Commission specifically offered (J.S. App. 37a) to entertain advertising proposals which would encourage shifts in consumption from more expensive peak to less expensive off-peak usage.

by stifling information and inhibiting consumer choices.[10] In this respect LILCO has totally misrepresented the Commission's position. This case is not one concerning the merits of electric space heating. Rather, the Commission's order under attack bans the promotion through advertising of all electric usage in order to accomplish certain important state objectives discussed, *infra*, that can be accomplished in no other way.[11] LILCO's brief, unlike Central Hudson's, does not consider the issue of promotional advertising generally which is the subject of the Commission's order, but rather attempts to show that electric space heating should be exempted from the Commission's promotional advertising ban.

After its argument that electric promotional advertising should be protected because of its value to society, Central Hudson also argues (Br. pp. 20-22) that neither its status as a utility nor the commercial character of its advertising diminishes its First Amendment protection. We have already discussed this Court's decisions on advertising, noting that in *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978), the Court determined that commercial communication may be regulated by the state when it is "deemed harmful to the public" even if speech is part of the activity. Central Hudson notes (Br. p. 22) that *Ohralik* concerned in-person solicitation for legal services, a fact not present here. It is apparent from

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[10] For example, LILCO's brief (p. 10 n. 12) argues, without record support that the "...Commission believes that such a consumer choice would be unfortunate..."

[11] The Commission has never taken the position that electric space heating should be discouraged. Its sole concern is the promotion of electric usage by electric utilities. The Commission, of course, has ample statutory authority to ban electric space heating (Public Service Law § 66(2)), but has chosen not to do so because a sufficient basis for such an action has not been shown.

the language of this Court, however, that it was not merely concerned with specific issues at hand, but rather was discussing generally the role of regulation in regard to First Amendment protection for commercial speech. The Court was clearly correct when it has noted the "commonsense difference" between commercial speech and other forms, differences which fully support regulation of speech by electric utilities. Moreover, *Ohralik*, like the present case, concerned the adverse effects of promotional advertising rather than the informational advertising involved in many of the other recent commercial speech cases decided by this Court. As we discuss in Point II below, the detrimental effect of promotional advertising prohibited here far outweighs any asserted benefit to society.

II. The Commission's prohibition of promotional advertising fulfills paramount state interests.

Central Hudson (Br. pp. 22-33) seeks to minimize the importance of the state interests underlying the Commission's prohibition of electric promotion. The company is apparently unable to argue with the Commission's finding that energy conservation and rate stability are important interests which are properly subject to regulation by the state.[12] Its argument therefore is primarily limited to an attempt to show that the Commission's ban will not fulfill the goals it purports to achieve. We believe that this attack on the Commission's order is neither correct nor sufficient to show that the ban is not justified.

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[12] Insofar as national policy is concerned, Section 102 of the National Energy Conservation Policy Act, provides:

> The Congress finds that (1) the United States faces an energy shortage arising from increasing demand for energy, particularly for oil and natural gas, and inefficient domestic supplies of oil and natural gas to satisfy that demand:...

Before pursuing the state interests underlying the Commission's restriction, it is first necessary to review briefly the Commission's legal relationship with respect to electric utilities in New York State, including Central Hudson. The Commission's restrictions on promotional advertising are grounded in its concern that Central Hudson fulfill its obligation under the New York Public Service Law to provide "adequate" service at "just and reasonable" rates (Section 65(1)). The Commission, under state law, is required to set reasonable rates (New York Public Service Law §§ 66(2) and (12); 72). The Commission has also been authorized by the Legislature to prescribe ". . . such reasonable improvements [in Central Hudson's practices] as will best promote the public interest . . ." (New York Public Service Law § 66(2)).

Further, in the performance of its duties the Commission is required to ". . . encourage all persons and corporations subject to its jurisdiction to formulate and carry out long-range programs, individually or cooperatively, for the performance of their public service responsibilities with economy, efficiency, and care for the public safety, the preservation of environmental values and the conservation of natural resources." (New York Public Service Law § 5(2)). The State courts have interpreted the latter section of the law as providing the Commission with authority to require such diverse measures as underground electric facilities (*Sleepy Hollow Lake, Inc. v. Public Service Commission*, 43 A.D.2d 439 (3d Dept.), motion for leave to appeal denied, 34 N.Y.2d 519 (1974), and home insulation (*Oil Heat Institute of Long Island, Inc. v. State of New York Public Service Commission*, 91 Misc. 2d 109 (Supreme Court, Albany County, 1977). There is no aspect of Central Hudson's actions related to the rendition of utility service that is not subject to regulation by the Commission.

Accordingly, the Court of Appeals found that the order was reasonably related to the Commission's regulatory responsibilities. As the Court stated (J.S. App. pp. 4a-5a):

> In light of the current exigencies, one of the policies of any public legislation must be the conservation of our vital and irreplaceable resources.
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> • • •
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> It necessarily follows, therefore, that the commission possesses ample power to prescribe reasonable measures designed to prevent wasteful consumption or unneeded expansion of utility services. By prohibiting promotional advertising of electric power, the commission has taken precisely such a step. In its expertise, the commission could have reasonably concluded that promotional advertising might tend to increase injudicious and unnecessary consumption of electrical power. Given this, the authority for the advertising ban becomes apparent.

The Commission found (J.S. App. 62a-63a) that promotional advertising of electric service at the present time will have a detrimental impact on utility rates and service. It determined that promotion of electricity would increase the cost of providing electric service, increase New York State utilities' dependence on foreign oil and increase adverse environmental impact as a result of additional generation. Insofar as conservation is concerned, the Commission found (J.S. App. 37a) that increased generation as a result of promotional advertising ". . . would aggravate the nation's already unacceptably high level of dependence on foreign sources of [oil] supply[13] and would, in addition, frustrate rather

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[13] President Carter recently stressed the importance of this nation's dependence on foreign fuel oil in his State of the Union message: "The crises in Iran and Afghanistan have dramatized a very important lesson: Our dependence on foreign oil is a clear and present danger to our national security." (*New York Times*, January 24, 1980, p. A12).

than encourage conservation efforts . . ." This finding is both reasonable and unassailable from a practical standpoint. New York's utilities are required to encourage conservation by their customers. In Central Hudson's case, 775 megawatts of its 820 megawatt capacity are oil fired.[14] Because oil-fired generation is the most expensive and therefore the last to be put on the line, each additional kilowatt hour consumed in New York means that more fuel oil (mostly imported from foreign countries) will be burned.[15]

In order to reduce electric usage, New York State electric utilities are required in accordance with the New York State Public Service Law to encourage conservation by their customers (§ 5(2)), conduct energy audits of residential premises and provide financing of certain energy conservation devices for their customers if requested (Article VII-A). Nowhere does Central Hudson dispute the desirability of or need for conservation, but it argues (Br. p. 25) contrary to the express finding of the Commission (J.S. App. 57a) that the use of electricity can be promoted consistently with reduced use of foreign fuel oil. As we have discussed above, if Central Hudson can present to the Com-

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[14] Report of Member Electric Systems of the New York Power Pool 1978, (Vol. 1, p. 343).

[15] Central Hudson argues (Br. p. 23) that the Commission made but a "faintly affirmative" claim that its advertising ban would promote conservation. If the company had read further it might not have found the claim so "faint". The Commission stated (J.S. App. 37a):

> . . .[C]onservation of energy resources remains our highest priority. We do not consider it inconsistent with the principle to implement programs that admittedly will be less than optimally effective, in a national context. It is reasonable to believe that a continued proscription of promotion of electric sales will result in some dampening of unnecessary growth so that society's total energy requirements will be somewhat lower than they would have been had electric utilities been allowed to promote sales.

mission an advertising program which will have the impact of conserving fuel oil along with promoting electricity and not run afoul of the other state interests considered by the Commission, particularly rate stability, the utility may do so at any time. The simple fact is that the Commission has yet to see a proposal that has these asserted benefits Central Hudson claims would result from advertising by it.[16]

Central Hudson's response (Br. pp. 24-25) to the Commission and the New York courts who found that conservation is a compelling state interest is that the ban will be ineffectual. This argument might be relevant if the utility could demonstrate that a restriction on electric promotion in New York State will not help to lessen electric growth for those whose advertising is affected (*i.e.*, New York State electric utilities).[17] Central Hudson, however, does not argue that the Commission's order will not accomplish its goal, but rather aruges that unless restrictions are instituted nationally, in other states or for other uses of energy, that the restriction will not reduce significantly energy consumption in the

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[16] The record in this case is completely devoid of utility proposals to advertise in ways that will not undermine the state interests sought to be protected by the Commission through its ban. Accordingly, this Court is merely being presented with *post hoc* rationalizations by Central Hudson's counsel in an attempt to debate the findings made by the Commission.

[17] The utility, of course, cannot make this argument because all it would prove is that promotional advertising had no impact on electric sales and is therefore useless.

United States.[18] Despite Central Hudson's effort to explain (Br. p. 25) the relevance of this argument, we still fail to understand why it is of any consequence to this case. The Commission's order extends only to New York State electric utilities who rely for oil almost exclusively on expensive and unreliable foreign sources and applies in a state where the Legislature has found (McKinney's Consolidated Laws of New York, Book 47, Pocket Part, p. 101):

> . . . In the State of New York, which consumes, to an overwhelming degree, far more energy than it produces, the need for energy conservation is of particular importance.

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[18] Central Hudson's argument that the promotional ban applies only in New York State and not nationally fails to consider that New York State in general and electric utilities in particular are more dependent on foreign oil than is the nation as a whole. The *Draft Report, New York State Energy Master Plan* published by the New York State Energy Office, August 1979, shows New York's heavy dependence on foreign oil. The report states (p. 291):

> By 1978, petroleum's share of energy sources in New York expanded to 66 percent—compared to 48 percent nationwide. Petroleum products manufactured from foreign crude oil, either at domestic or foreign refineries, accounted for 70 percent of the State's oil supplies... Nationally, 44 percent of the total oil requirement is met by foreign crude oil....

With respect to electric generation alone, the New York Power Pool (one of whose members is Central Hudson) relies on oil to generate 44.1% of its electricity while nationally only 16% of electricity is generated by oil (*Draft Report*, p. 339).

The *Draft Report* also noted (p. 292) that dependence on foreign oil has increased because many electric generating facilities were required for environmental reasons to convert from coal to oil in the 1970's. According to federal government supply figures for 1978, over 90% of the heavy residual oil used by New York's electric utilities comes from foreign sources.

The Commission's order does fulfill its purpose—to remove a source of stimulus for electric growth in New York State. An important state interest thus underlies the regulation.[19]

As an adjunct to its conservation finding, the Commission also noted (J.S. App. 57a) that promotion of electricity by utilities was at odds with the utilities' obligation to encourage conservation by their customers. Promotion would, the Commission stated, provide "totally misleading signals that conservation is unnecessary". Central Hudson (Br. pp. 30-33) miscasts the Commission's finding in suggesting that the Commission's position is "a pretty severe reflection on the public intelligence" and that the Commission believes that the public cannot be trusted to understand that a utility may both promote and urge conservation at the same time.

Central Hudson's distortion of the Commission's position is both unfortunate and does nothing to advance the decisional process in this case. The Commission's concern includes the fact that (J.S. App. 58a):

> Advertisements encouraging installation of heating equipment will frequently occur during the summer periods when air-conditioning usage is at its peak and when requests for conservation are being made.

The public, therefore, on the one hand, will be encouraged by its local utility to turn up the thermostat and accept a less comfortable temperature setting in order to save electric energy, while at the same time it would be suggesting that customers install heat pumps which provide additional air-conditioning capacity and will thus exacerbate the problem of peak load consumption (J.S. App. 58a).

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[19] Central Hudson's argument concerning the limited impact of the Commission's order is no different from arguing that an ordinance requiring parade permits in Syracuse fails to serve an important state interest because it will have no impact on parades in New York City.

Public confusion is not the issue. The public would be only too well aware of what is going on: that Central Hudson tells them to live less comfortably, while at the same time it urges development of greater usage through increased installation of electric heating equipment. Public distrust and disbelief in the necessity for sacrifice and conservation will be the logical consequence. This two-faced approach to the problem of conservation can, as the Commission found, only be detrimental to the public interest and fail to advance the important state interests of rate stability and energy conservation.

The Commission has not attempted to manipulate public opinion or shield the public from needed information. All that the order does is assure that utilities not engage in conflicting activities—urging greater usage while at the same time encouraging less usage. This case is, therefore, unlike the cases cited by Central Hudson (Br. pp. 30-33) where the state was acting to prevent the dissemination of information for fear that the public may act on it.[20]

An additional public interest fulfilled by the Commission's ban concerns the stability of electric rates in New York State. The Commission found that promotion of electric energy will

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[20] Despite Central Hudson's attempts to downplay the effectiveness of appliance dealers' advertising (*e.g.*, Br. p. 30), the fact remains that electric space heating may still be advertised in New York by other than regulated utilities (J.S. App. 59a). This clearly provides a source of information to the public about heat pumps and other mechanisms which use electric energy, while at the same time avoiding the problem of the regulated utility sending completely contrary messages to the public that conservation is needed on the one hand, but that everyone should consider using more electricity on the other. In addition, utilities remain free to provide advice to customers if they request it. The Commission's restriction relates only to direct promotional advertising by the utility itself.

encourage load growth and increase the need for new, costly generating facilities. Confronting the issue of promotional advertising and electric rates, the Commission stated (J.S. App. 57a):

> . . . The rates of electric utilities in this State continue to rise. The need for such increases derives in substantial part from pressures for increasing plant capacity to meeting growing demand. While some progress is being made to price electricity to meet its marginal cost, it is clear that the rates charged today do not cover the marginal costs of new capacity. In these circumstances, promotion of electric usage by electric utilities will simply exacerbate the pressure for spiraling prices. . . .

The rate problem discussed by the Commission is that utilities in New York State experience different costs of producing electricity at different times of the day and year. The Commission has experienced many difficulties in attempting the first steps of establishing rates that reflect varying costs and charging those rates to the customers responsible for their creation. *See, New York State Council of Retail Merchants v. Public Service Commission*, 45 N.Y.2d 661 (1978). At the present time, New York utilities do not, except in isolated instances, have rates that adequately reflect marginal cost differences and do not have economically practical time-of-day metering equipment that can measure fluctuations in usage for most customers.

Utilities are, therefore, unable to charge their customers actual costs but must charge on an average cost basis. This means that electricity cannot be priced in an economically efficient manner that maximizes the use of society's resources. It also means that peak loads are underpriced and therefore encouraged. Underpricing of peak loads leads in turn to the need for new, costly generating facilities. In other words,

existing utility rate structures send incorrect price signals to consumers. If some consumers cause increased peak load, all customers will be required to bear a portion of the increased cost burden.

The Commission is in the initial steps of attempting to structure electric rates so that the customers pay the full cost of service depending upon the time at which electricity is consumed. The Commission has announced (J.S. App. 38a) its intention to review its ban on promotional advertising at such time as the problems presented by an inadequate utility rate design no longer exist.[21]

Central Hudson would have this Court ignore the deficiencies in existing rate structures and strike down the Commission's advertising restriction as if these problems did not exist. The simple truth is, however, that the problems of inadequately structured rates do exist and will continue to exist until new, more sophisticated rate structures are developed. Central Hudson itself has a vital role in supplying data so that the Commission may set cost sensitive rates. To our

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[21] The Commission has been engaged for the last several years in developing more sophisticated rate structures. In its Case 26806—*Proceeding on Motion of the Commission as to Rate Design for Electric Corporations*, the Commission has compiled a record upon which to take initial steps to institute time-of-day pricing; however, sufficient data has not yet been accumulated nor have metering practices been developed to institute rate structures which reflect, except in limited situations, the variations in cost of providing electric service. Central Hudson's argument (Br. pp. 28-29) that the Commission can use its rate power to solve the problem created by promotion simply ignores the reality of the state of the art in rate design. If a utility does not provide proper economically efficient rates, or supply the data that permits such rates to be fixed, it has no basis for complaining that the regulatory commission has not fixed proper rates.

knowledge, the utility has been one of the less enthusiastic companies with respect to adopting marginal cost-based rates. Its own failure to contribute to a rapid solution to the rate structure problems delineated by the Commission should not be used as an excuse for striking down regulatory measures designed to ameliorate the existing rate structure deficiencies.

In addition to the arguments raised by Central Hudson, *amicus* LILCO (Br. pp. 21-23), arguing that electric space heating should be allowed to be promoted, presents a slightly different approach to this case. It did not contest, but rather accepted for the purposes of summary judgment, the Commission's findings concerning the undesirable effects of promoting electric space heating. Nevertheless, the company argued, and Judge Pratt below accepted LILCO's contention, that the ill effects of promotional advertising are not relevant to this case. Judge Pratt stated (J.S. App. 97a) that ". . . [a]lthough the public interests sought to be served by PSC are important, it is not necessary to suppress protected speech in order to achieve those ends . . . ." Judge Pratt noted that the Commission had authority to ban electric space heating and that the Commission could take this direct regulatory approach rather than inhibit the free flow of commercial information.

We agree that in the case of electric space heating the Commission could ban the use of this product by new customers. Even if the Commission did ban the use of electric space heating, however, the problems with promotion would still exist if utilities may still tout other uses of electricity. More importantly, by not banning electric space heating although prohibiting its promotion by electric utilities, the Commission leaves open an additional consumer choice as to the type of heating service customers may use. Some customers may wish to choose electric space heating, but if the Commission were to ban the product rather than limit its promotion, the Com-

mission's action would have the effect of reducing consumer choice rather than merely foreclosing promotional advertising from one source.

In addition, Judge Pratt noted (J.S. App. 94a) that the Commission had taken no direct steps to limit the use of electricity but ". . . by suppressing accurate promotional information it is attempting to avoid certain perceived detrimental effects of electric space heating . . ." We submit that this statement is totally unsupported by the record. The Commission as discussed, *supra*, is vitally concerned with the adverse consequences of promotion generally, but the only way to eliminate those problems is with a ban on advertising. Of course, the Commission could consider other measures, including rationing of electricity or a ban on installation of new electric space heating. These steps would be more detrimental to consumer choice than a ban on advertising by electric utilities. The ban's sole aim is to assure lessened growth with all of its beneficial consequences.[22]

III. The Public Service Law contains adequate standards to support the Commission's order which itself is clear, precise and confined to the state interests sought to be achieved.

Central Hudson argues (Br. pp. 33-46) that the Public Service Law as applied in this case by the New York Court of Appeals is unconstitutional because the legislature has not pro-

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[22] The Commission's concern with conservation and reliability of oil supplies has not been limited to promotional restrictions. For example, the Commission has established insulation standards for new dwellings and dwellings converting to electric heat (Case 26913—*Insulation Standards*, 16 NY PSC 702 (1976)) in order to conserve energy. Further, the Commission in the wake of the 1973 Arab oil embargo has required utilities to maintain an inventory of fuel oil sufficient for 45 days generation (Case 26200—*Fuel Oil Storage Capacity*, 13 NY PSC 1710 (1973)).

vided adequate standards for Commission action to restrict speech by public utilities. The company further argues that the Commission's order is also vague and overbroad. Neither contention is correct nor was raised below in a timely manner and accordingly may not be raised in this Court.[23] This Court has repeatedly held that it will not exercise jurisdiction to consider federal questions presented for the first time in a jurisdictional statement pursuant to 28 U.S.C. 1257(c). *Cardinale v. Louisiana*, 394 U.S. 437 (1959); *Safeway Stores, Inc. v. Oklahoma Retail Grocers*, 360 U.S. 334 at 342 n. 7 (1969); *Herndon v. Georgia*, 295 U.S. 441 (1935); and *Crowell v. Randell*, 10 Pet. 368 (1836).[24] In any event, the claims are without merit.

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[23] See Central Hudson's petition to the New York Supreme Court (J.S. 68a-73a).

[24] Central Hudson argues (Br. p. 34 n. 34) that it had raised the issues of vagueness and overbreadth of the Commission's order in the state courts. It further argues that it could not have argued that the Public Service Law lacks adequate standards until the Court of Appeals upheld the Commission's order. The first contention is misleading; the second is wrong. Central Hudson raised its claims concerning the order in an untimely fashion (for the first time in the Court of Appeals, rather than the lower courts as required, see, Cohen and Karger, *Powers of the New York Court of Appeals*, Revised Edition § § 55, 169) and the issues were not actively argued or passed upon by the state courts. Accordingly, insofar as overbreadth and vagueness are concerned, Central Hudson's untimely discussion presents problems of an inadequately developed record and lack of opportunity for state court review, problems requiring dismissal of the contentions in accord with the decisions cited in the text. Further, insofar as these claims are concerned, Central Hudson has failed to specify the information required by this Court's Rule 15(1)(d)—details of how the issues were raised and decided below.

The company's second contention, that it could not have raised the issue of lack of adequate standards below, is incorrect. The company could obviously have argued in the state courts that if they upheld the Commission's order, the law as thereby construed would have lacked adequate standards.

A. The Public Service Law.

The New York Court of Appeals determined that the Commission has statutory authority to restrict promotional advertising (J.S. App. 3a-5a). It did so after reviewing the "vast power" conferred upon the Commission by the legislature. Central Hudson correctly notes (Br. p. 36) that the Court of Appeals' determination in this regard is not a matter reviewable in this Court.

Nevertheless, it seeks to attack the Court of Appeals' decision by arguing that there are no standards in the law sufficient to allow the Commission to restrict the utility's speech. The law, however, contains specific directives (1) that the Commission encourage utilities to act so that they will preserve environmental values and conserve natural resources (Public Service Law § 5(2)), and (2) that the Commission require acts and practices as "will best promote the public interest" (Public Service Law § 66(2)). Further, all utilities are required to provide "safe and adequate service" at "just and reasonable rates" (Public Service Law § 65). Of course, it must be remembered that these standards have been implemented and refined in a regulatory context in which Central Hudson and other utilities subject to the Commission's order have operated for many years.

The Commission's order clearly fulfills these objectives and the Court of Appeals so found. The legislative standards followed by the Commission are more than adequate to pass constitutional muster, not only for economic regulation, but also for orders restricting promotional advertising in the context of regulating utility conduct. While the Public Service Law is not a statute designed to regulate speech, it is a statute designed to assure that utilities follow practices that are in the public interest.

In its attack on the Public Service Law, Central Hudson contends (Br. p. 34, caption) that the law is vague, overbroad and lacking in standards. It has briefed, however, only the claim of lack of standards.[25] The provisions of the Public Service Law quoted above and the construction given them by the New York courts result in standards far more precise than the "public interest" and "public welfare" cited by Central Hudson (Br. p. 36).[26]

This Court has held that speech may be controlled in the context of a general regulatory scheme which has no specific reference to speech. *Arnett v. Kennedy*, 416 U.S. 134 (1974); *cf. Parker v. Levy*, 417 U.S. 733 (1974). In *Arnett*, an employee had been dismissed from the Office of Economic Opportunity for violating 5 U.S.C. § 7501(a), authorizing removal for "such cause as will promote the efficiency of the service". Even though the statute did not mention speech, that broad standard was found to justify dismissal of the employee for certain of his statements. This Court rejected appellee's argument that lack of more precise standards abridged his freedom of expression. Similarly, in this case there was no need for the legislature to detail specifically the measures that the Commission may use to accomplish valid regulatory goals. [27]

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[25] We will therefore address only Central Hudson's claim of lack of standards; however, we disagree with any assertion that the law is either vague or overbroad.

[26] The company's reference to *Hannegan v. Esquire*, 327 U.S. 146 (1946), is misplaced. There the opportunity for censorship was obvious, since in deciding whether mail was entitled to a second-class permit, the Postmaster had gone outside the statutory standards and applied a "public good" standard of his own devise (327 U.S. at 149-150).

[27] Central Hudson's footnote reference (Br. p. 36) to *Arnett* fails to come to grips with the relevance of that case. Contrary to Central Hudson's assertion, there is no basis for concluding that a statute regulating employee relations is any more "narrowly targeted" than the Public Service Law which is addressed to specific utility-regulatory standards.

Central Hudson also argues (Br. p. 37) that the Court of Appeals did nothing to narrow the circumstances under which it might find an order restricting speech to be invalid. As we have discussed in Point II *supra*, there are several important state interests which justify the Commission's order. There was no need for the Court of Appeals to reject any of the grounds set forth by the Commission since they are all valid reasons for an advertising ban. The Court was obviously not required to hypothesize grounds that would fail to justify the Commission's order.

B. The Commission's Order.

Central Hudson (Br. pp. 37-40) also attacks the Commission's order on grounds of vagueness and overbreadth. We will address the arguments in that order.

The claims of vagueness and overbreadth must be viewed as distinct because they are based on separate constitutional doctrines. A challenge based on a claim of vagueness involves a lack of notice assertedly so great that it runs afoul of the procedural guarantees of due process. The wording of the challenged law must be so vague that "men of common intelligence must necessarily guess at its meaning." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). On the other hand, a claim of overbreadth under the First Amendment attacks a law for invalidating expression clearly protected by the Constitution whether or not the particular conduct or speech in the case at hand is deserving of protection. *Zwickler v. Koota*, 389 U.S. 241, 249-250 (1967); *N.A.A.C.P. v. Button*, 371 U.S. 415, 432-433 (1963); *United States v. Robel*, 389 U.S. 258, 266 (1967); *Gooding v. Wilson*, 405 U.S. 518 (1972).

The concern of this Court respecting vagueness claims is that the inadequate notice inherent in an overly vague law will result in a "chilling effect" felt by those who would speak

but are unsure of the contours of the challenged statute. *See, Younger v. Harris*, 401 U.S. 37, 50-51 (1971); *United States v. Harriss*, 347 U.S. 612, 626 (1954); *see also, Cameron v. Johnson*, 390 U.S. 611, 616 (1968). Here, there is nothing vague about the challenged order. It does not violate the principle stated in *Connally v. General Construction Co., supra*. There is no danger that speech will be chilled. Central Hudson knows precisely what it must do—it must not engage in promoting the use of electricity through advertising. Here, there is no lack of notice to deprive Central Hudson of its due process right to fair and adequate notice.[28] The company may also seek guidance from the Commission if it has any doubt as to what constitutes promotional advertising. This Court in *C.S.C. v. Letter Carriers*, 413 U.S. 548 (1973), found "important", when rejecting a vagueness and overbreadth claim, that a person subject to a statute restricting freedom of expression (there the Hatch Act, 5 U.S.C. § 7324(a)(2)) could resolve ahead of time whether his "proposed course of conduct" would fall within the proscription of the statute as interpreted by the administering agency, 413 U.S. at 580.[29] Central Hudson has the opportunity here to have the Commission consider whether its proposed conduct comes within the prohibition of promotional advertising.[30]

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[28] The order by its terms does not allow the Commission to "pursue [its] personal predilections," as was the case in *South v. Goguen*, 415 U.S. 566 (1974), nor does it subject Central Hudson to a regulatory maze as was the case in *Kevishian v. Board of Regents*, 385 U.S. 589 (1967) (both cited by Central Hudson, Br. p. 37).

[29] Similarly in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the Court noted that commercial advertisers, generally, are more likely to be able to ascertain in advance the lawfulness of proposed activity. *Id.* at 381.

[30] Central Hudson's string of hypotheticals (Br. p. 39) questioning what constitutes advertising does not show that the Commission's order is vague. If the company has serious doubts concerning any of the activities cited, it may refer the matter to the Commission. Its examples only point to the problems and speculation encountered when a party raises matters for the first time in this Court.

Central Hudson's claim that the Commission's order is defective for overbreadth is also in error. Overbreadth analysis involves two factors: first, a relaxation of the normal standing requirement so that litigants have been allowed to raise the rights of others who through the very existence of the challenged statute may have the right of expression hampered (*Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)) and second, relaxation of the normal requirement that Article III courts resolve disputes which are concrete. Thus, facts not involved in the actual litigation before the court but involving the same claimant may be hypothesized which would require a finding of unconstitutionality. *N.A.A.C.P. v. Button*, 371 U.S. 415, 432-433 (1963). The Court's concern with overbreadth, like vagueness, in the First Amendment cases is the likelihood of a "chilling effect" on protected expression. *N.A.A.C.P. v. Button, supra; Shelton v. Tucker*, 364 U.S. 479 (1960).

The company states (Br. p. 38, n. 38) that in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), this Court, while declining to apply overbreadth analysis to "professional advertising" was addressing only the relaxed standing element of overbreadth. However, the relevant language in the *Bates* opinion is not so narrowly drawn. The Court stated (433 U.S. at 381): ". . . we decline to apply it [overbreadth] to promotional advertising, a context where it is not necessary to further its intended objective [citations omitted]." The Court therefore dismissed overbreadth analysis in promotional advertising cases in its entirety. Its reasons are fully applicable here. The Court found (433 U.S. at 381):

> . . . [S]ince advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation. Moreover, concerns for uncertainty in determining the

> scope of protection are reduced; the advertiser seeks to disseminate information about a product or service that he produces and can presumably determine more readily than others whether his speech is truthful and protected.

Accordingly, Central Hudson's narrow reading of *Bates* is in error; overbreadth analysis has no place in promotional advertising cases

Even if the doctrine of overbreadth were applicable to advertising cases, the Commission's order here is not overbroad. Central Hudson's contention rests on its assertions (Br. pp. 38-39) that the order inadvertently applies to all electric promotion, not just space heating and cooling. There is no basis for the company's conclusion that the Commission meant to restrict its order to heating and cooling when the Commission expressed the need (as we have discussed in Point II) to ban all promotion in order to avoid stimulation of demand, conserve energy, keep electric prices from rising and avoid misleading signals.

Apparently Central Hudson's argument, although couched in terms of overbreadth, amounts to no more than a challenge to the wisdom of banning all promotional advertising. In this respect its argument is no more than a variation of its discussion on why the Commission's ban fails to serve compelling state interests (Central Hudson Br. pp. 22-23). The Commission order does not have the effect of banning advertising not directly related to promotion of electricity. There is no impact on Central Hudson unrelated to the order's "plainly legitimate sweep". *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)

IV. The Commission's order does not deprive Central Hudson of equal protection.

Central Hudson's final argument (Br. pp. 40-42) is that because electric promotion is prohibited and oil dealers remain free to advertise, it has been deprived of equal protection. The argument lacks merit because the Commission, whose jurisdiction extends only to electric utilities, has acted in strict accordance with its statutory authority to protect utility customers from the adverse effects of promotion of electric usage. The Court of Appeals found the Commission's order to be properly related to valid governmental interests.

It is true that this Court has examined closely government actions which impose "a selective restriction on expressive conduct . . ." *Police Department of Chicago v. Mosley*, 408 U.S. 92, 102 (1972), cited by Central Hudson (Br. p. 42) and relied upon by *amicus* Long Island Lighting Company (Br. pp. 29-31). In this case, however, the class of businesses effected and the state interests are sufficiently related, so that the Commission's order withstands First Amendment—equal protection scrutiny. In fact, the electric utilities subject to the Commission's regulation of which Central Hudson is one, represent the entire—and only body—of would-be-promoters of electricity whose promotion would have the adverse impact on New York State electric ratepayers discussed in Point II above.[31]

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[31] As noted previously, the *Draft Report* of the New York State Energy Office shows that foreign oil provides a higher proportion of the supply of heavy, residual oil burned by utilities than lighter distillate oil used for residential home heating. Therefore, promotion by utilities raises a greater problem of aggravating New York State's dependence on foreign fuel oil than does promotion by fuel oil dealers.

Thus, the order is narrowly drawn to reach only those whose activities would create the problems the Commission seeks to control. The class is neither under, nor overinclusive.

The cases relied by Central Hudson are each significantly different from the case at hand. In *Police Department of Chicago v. Mosley, supra,* the ordinance at issue banned picketing or demonstrating near a public school during a school session, but labor picketing in front of a school involved in a labor dispute was specifically exempted. While the asserted purpose of the ordinance was to avoid disrupting school, the narrow exception carved out for labor picketing flew in the face of the intended goal. The class selected was not only unrelated to the purpose of the ordinance, but it did not even represent a reasonably graduated approach to achieving that purpose such as this Court has approved in previous cases raising equal protection claims. *Railway Express Agency v. New York,* 336 U.S. 106 (1949); *Califano v. Jobst,* 434 U.S. 47, 57 (1977). The Court in *Mosley* found that the ordinance resulted in denying a forum for the expression of some ideas while permitting the expression of one particular kind of idea without any valid rationale. Here, in contrast, both the class (electric utilities) and the restriction (promotion of electricity usage) are narrowly drawn to achieve the valid state interests in the most efficient, specific way possible.

Likewise, the statute challenged in *Williams v. Rhodes,* 393 U.S. 23 (1968) (Central Hudson, Br. p. 41), placed an "immediate and crippling impact" on the basic right to participate in the voting and election process of anyone not a member of one of the two major political parties. The law put a nearly impossible-to-meet burden on new parties to get on a ballot. The Court found (393 U.S. at 32-33) the asserted pur-

poses, political stability, guaranteeing majority rather than plurality rule, and avoidance of public confusion, were in some cases not even met by the law and taken together were simply not compelling enough to impose such a drastic impact on basic First Amendment rights. Neither a sufficient lack of relationship between means and end, nor a crippling impact on a broad range of fundamental liberties is involved here.

In *Cox v. Louisiana*, 379 U.S. 536 (1965), the Court concluded that the appellant's conviction, for *inter alia*, disturbing the peace, was invalid because the ordinance in question gave local officials "unfettered discretion" to decide who could and could not demonstrate peacefully in the streets. Here, there is neither a pattern of arbitrary enforcement nor an opportunity for unfettered discretion to which Central Hudson can point.

In seeking to show that the order is defective because it does not also include fuel oil dealers, Central Hudson (Br. p. 40) of necessity focuses only on the oil conservation rationale advanced by the Commission. Its argument ignores the other important state interests discussed in Point II, above. But even as to the oil conservation rationale it must be remembered that this Court has often held that government may move gradually toward a valid goal, regulating some and not all involved, as long as there is some rational basis for the differentiation in treatment. *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 71 (1978); *Nixon v. Administrator of General Services*, 433 U.S. 425, 471 n 33 (1977); *Cleland v. National College of Business*, 435 U.S. 213 (1978); *Califano v. Jobst*, *supra*; and *Railway Express Agency v. New York*, *supra*. Nothing in the First Amendment equal protection cases indicates that this principle does not hold in the First Amendment context so long as the law itself does not violate First Amendment

freedoms (*see, San Antonio School District v. Rodriquez*, 411 U.S. 1, 61 (1973) (J. Stewart, concurring)), or extend a forum to one group while denying it to all others, (*see, Police Department of Chicago v. Mosley, Id.* at 96).

The state interests underlying the Commission's order show that imposition of advertising restrictions on electric utilities alone are rationally related to the Commission's regulating functions. The state has acted to protect the interests of electric consumers by regulating the electric utilities, the only relevant group for this purpose. There has been no attempt to favor oil dealers at the expense of utilities.[32]

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[32] Even though the Commission has restricted utilities from promotional advertising, it has not prohibited promotional advertising by others, including appliance dealers and manufacturers of electric space heating equipment. Advertisement of electric space heat *per se* has therefore not been precluded by the State since entities other than utilities remain free to promote it.

Conclusion

For the above reasons, the decision of the Court of Appeals of the State of New York should be affirmed in all respects.

Respectfully submitted,

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